Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services	)	WC Docket No. 11-188

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

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January 19, 2012

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Sprint Nextel Corporation ("Sprint Nextel") submits these reply comments in response to the *Public Notice* the Federal Communications Commission ("FCC" or "Commission") issued on November 10, 2011, seeking comments on the Petition of tw telecom, *et al.* to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services.[1]

I. BACKGROUND AND SUMMARY

In late 2004, Verizon filed a petition for forbearance from a broad range of Title II common carrier requirements, as well as the Commission's *Computer Inquiry* rules. There was a split vote among the four sitting Commissioners which resulted in the Commission being unable to issue a decision on the merits of Verizon's petition before the statutory deadline for action expired. Thus, Verizon's petition was "deemed granted by operation of law, effective March 19, 2006."[2]

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[1] Public Notice, *Comment Sought on Petition Seeking Reverse of Forbearance Granted to Verizon Telephone Companies by Operation of Law*, 26 FCC Rcd 15683 (2011) (DA 11-1879) ("*Public Notice*"); *see also* Petition of tw telecom inc. et al., WC Docket No. 11-188 (Oct. 4, 2011) ("Petition").

[2] News Release, FCC, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted*

By the following year, the Commission had already indicated that it planned to reverse this default grant of forbearance and restore regulatory parity among similarly-situated local exchange carriers ("LECs") by reapplying non-dominant carrier regulation to Verizon.[3] Despite the FCC's stated plan, the order addressing Verizon's default grant of forbearance from non-dominant carrier obligations was never issued. As a result, in October 2011, Sprint Nextel and others filed a petition urging the Commission to follow through on its intentions and restore regulatory parity.[4] As Petitioners noted, there is no reason that Verizon should be exempt from the basic economic and public policy requirements of Title II that apply to all other similarly-situated carriers.[5]

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by Operation of Law , WC Docket No. 04-440 (rel. March 20, 2006), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf>.

[3] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 50 (2007) ("*AT&T Forbearance Order*") (explaining the need to "avoid persistent regulatory disparities between similarly-situated competitors" and stating that the Commission "will issue an order addressing Verizon's [2004] forbearance petition . . . within 30 days").

[4] Petition at 1-4. Petitioners also noted that they intend to file a separate pleading seeking reversal of the forbearance from dominant carrier regulation granted to Verizon, AT&T, Embarq, Frontier and legacy Qwest. Petition at 9-10 n.36.

[5] *See* Petition at 16-21; *see also Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶ 59 (2007) ("*Embarq/Frontier Forbearance Order*") (refusing to create a regulatory disparity by granting forbearance from regulations that "apply generally to nondominant telecommunications carriers and LECs"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶ 65 (2008) ("*Qwest Forbearance Order*").

Predictably, Verizon filed comments urging the Commission to deny the Petition. In its comments, Verizon raised meritless procedural objections and made irrelevant claims about what it describes as the "robustly competitive" marketplace for non-TDM-based broadband transmission services.[6] Verizon's arguments are unpersuasive. Because the Petition seeks only to re-apply general Title II obligations – those that do not depend on a finding of market dominance – whether or not the marketplace for the services affected by the Verizon forbearance decision is competitive is irrelevant. Further, as explained below, the Commission has both the authority and the obligation to grant the Petition and ensure that Verizon is subject to the same regulations that apply to all similarly-situated LECs. Accordingly, the Commission should act expeditiously to grant the Petition and make all providers of non-TDM-based broadband transmission services subject to the same regulatory safeguards.

II. DISCUSSION

A. Granting the Petition Would Be Consistent with the Communications Act

In order to grant forbearance, the FCC must determine that each of three criteria is met: (1) enforcement of the regulation or provision at issue is not necessary to ensure that a carrier's charges, practices, classifications, or regulations are just, reasonable and not unreasonably discriminatory; (2) enforcement of the relevant provision or regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public

[6] Comments of Verizon, WC Docket No. 11-188, at 10 (Dec. 20, 2011) ("Verizon Comments").

interest.[7] Forbearance is warranted only if all three statutory criteria are met.[8] Accordingly, the FCC must reverse a grant of forbearance if any one of the criteria is not being met.[9]

In opposing the Petition, Verizon seeks to convince the Commission that sections 201 and 202, for example – statutory provisions that explicitly require that a carrier's charges, practices, classifications or regulations are just and reasonable and not unreasonably discriminatory – are not "necessary to ensure" that Verizon's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[10] This argument ignores Commission precedent finding that the statutory provisions at issue – including the "economic regulations" embodied by sections 201, 202, 214 and 251(b), as well as the "public policy regulations" of sections 222, 225, 229, 251(a)(2), 254(d) and 255 – are "necessary" even for carriers that have been relieved of dominant carrier regulation.[11]

In addition, even if the provisions in question are not absolutely essential, as Verizon appears to contend, they are still "necessary" within the meaning of section 10(a)

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[7] Section 10(a) of the Communications Act of 1934, as amended ("the Act"), codified at 47 U.S.C. § 160(a).

[8] *See, e.g.*, *CTIA and Cellco Partnership, d/b/a Verizon Wireless v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) ("the three prongs of § 10(a) are conjunctive" and a petition for forbearance may be denied if "any one of the three prongs is unsatisfied").

[9] *See, e.g., Framework for Broadband Internet Service,* Notice of Inquiry, 25 FCC Rcd 7866, ¶ 98 (2010).

[10] 47 U.S.C. § 160(a)(1).

[11] *See, e.g.*, *Qwest Forbearance Order* ¶¶ 64-65; *see also* Petition at 10-13 (discussing the Commission's previous holdings stating that continued application of these statutory provisions, along with the regulations contained in 47 C.F.R. §§ 63.71(c), 63.03(b), and Part 61, subpart C of the Commission's rules, play an important role in furthering the competitive and consumer protection goals that led Congress and the Commission to impose these regulations on carriers that lack individual market power).

of the Act.[12] As the Commission has explained, "[i]n the context of prongs one and two [of section 10(a)], a requirement is 'necessary' if there is a strong connection between the requirement and the desired regulatory goal."[13] Clearly, there is a "strong connection" between statutory provisions that require Verizon to engage in just and reasonable conduct – provisions that apply to every other carrier in the United States[14] – and the "desired regulatory goal" of ensuring that Verizon engages in just and reasonable conduct.[15]

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[12] As explained in the Petition, each of the provisions and regulations at issue plays an important role in furthering Congressional goals and forbearance from these provisions is not in the public interest. *See* Petition at 10-13.

[13] *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h),* Order, 18 FCC Rcd 24648, ¶ 11 (2003) ("*Order on E911 Accuracy Standards Forbearance Petition*"); *see also CTIA v. FCC*, 330 F.3d at 509-510 (rejecting a narrow definition of "necessary" in section 10(a) and noting that "the word 'necessary' does not always mean absolutely required or indispensable").

[14] FairPoint and Frontier mistakenly argue that the FCC has "conferr[ed] on them the limited regulatory forbearance enjoyed by Verizon," at least in regard to certain landlines the two carriers obtained from Verizon. Comments of FairPoint Communications, Inc. and Frontier Communications Corporation, WC Docket No. 11-188, at 2 (Dec. 20, 2011) ("FairPoint Comments"). The sole support FairPoint offers for this proposition is a statement by the FCC that FairPoint stepped "into Verizon's shoes for any regulatory relief that the Commission has granted Verizon in the service area that pertain to the facilities and service operations that FairPoint is acquiring." FairPoint Comments at 2, quoting *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, ¶ 36 (2008) ("*FairPoint Order*"). Nothing in the *FairPoint Order*, or the Act, suggests that forbearance relief can be assigned to another carrier, however. Moreover, the language quoted by FairPoint makes clear that it is only entitled to regulatory relief that "the Commission has granted." As explained below, the forbearance relief at issue was not granted by the Commission. Finally, even if FairPoint stepped into Verizon's shoes for the forbearance relief, it follows that FairPoint would no longer be entitled to such relief if the Commission reverses Verizon's "deemed grant" of forbearance.

[15] *See AT&T Forbearance Order* ¶ 67 (rejecting an argument that enforcement of sections 201 and 202 is not "necessary to ensure that the 'charges, practices,

Similarly, it would appear axiomatic that consumer protection statutes, such as section 222, are necessary for the "protection of consumers."[16] Congress, in section 10, and the Commission in addressing the forbearance petitions filed by AT&T and other incumbent LECs, plainly viewed these general economic and public policy provisions of Title II as important safeguards that should apply to all carriers, including non-dominant carriers.[17] In addition, the FCC historically has not relieved non-dominant carriers of these generally-applicable statutory obligations, which provide an important measure of protection for consumers and competition. Consequently, and consistent with prior FCC determinations, Verizon should be subject to the same provisions that apply to all similarly-situated LECs.[18]

Despite the FCC's repeated statements about the harms caused by regulatory disparities between similarly-situated competitors,[19] Verizon maintains that it should not

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classifications . . . for[] or in connection with [AT&T's non-TDM services] are just and reasonable and are not unjustly or unreasonably discriminatory' within the meaning of section 10(a)(1)"); *see also id*. ¶ 75 (finding that the "public policy" requirements of Title II are "necessary" within the meaning of section 10(a)(1) of the Act).

[16] *Compare, e.g.*, 47 U.S.C. § 222 (governing the confidentiality of customer proprietary network information) *with* 47 U.S.C. § 160(a)(2) (permitting forbearance only if enforcement of the relevant regulation or provision is "not necessary for the protection of consumers"); *cf. CTIA v. FCC*, 330 F.3d at 513 (rejecting petitioners' argument that number portability requirements were not necessary for the protection of consumers and explaining that "[w]e do not take this argument seriously . . . because it is obvious" that the regulations in question afford consumers protection).

[17] *See, e.g., Embarq/Frontier Forbearance Order* ¶ 59 (discussing the importance of the "economic regulations that apply generally to nondominant carriers and to LECs," as well as the goals that led Congress to "impose these economic regulations on carriers that lack individual market power"); *Qwest Forbearance Order* ¶ 65.

[18] *AT&T Forbearance Order* ¶ 50; *see also, e.g.*, *Qwest Forbearance Order* ¶ 65 (explaining that "[a]llowing Qwest, but not its competitors, to avoid these obligations would undermine, rather than promote, competition among telecommunications services providers within the meaning of" section 10 of the Act).

[19] *See, e.g., Qwest Forbearance Order* ¶ 65; *Embarq/Frontier Forbearance Order* ¶ 59.

be subject to the same basic Title II safeguards that apply to its rivals. Among other tactics, Verizon attempts to create procedural hurdles to granting the relief the Petition seeks and emphasizes irrelevant "facts" about the competitive landscape for non-TDM services. As explained below, Verizon's arguments lack merit and should not deter the Commission from fulfilling its goal of eliminating "persistent regulatory disparities between similarly-situated competitors"[20] by reapplying basic Title II regulation to Verizon's non-TDM-based broadband transmission services.

B. Granting the Petition Does Not Require a Rulemaking Proceeding

Verizon incorrectly asserts that the Commission must complete a notice and comment rulemaking proceeding before it may grant the Petition.[21] This is simply not true.[22] Forbearance proceedings are not formal notice and comment rulemakings.[23] Thus, for example, the FCC has not issued Notices of Proposed Rulemaking ("NPRMs") in response to requests for forbearance relief. Instead, the Commission typically has

[20] *AT&T Forbearance Order* ¶ 50.

[21] Verizon Comments at 5-7.

[22] Similarly, Verizon's arguments that the FCC should act only prospectively appear to be inapposite. Verizon Comments at 8-9. The Petition does not seek retrospective relief. Petitioners ask only that the Commission act prospectively to ensure that Verizon is subject to the same obligations that apply to other similarly-situated LECs. *See* Verizon comments at 9 (agreeing that the FCC can act prospectively).

[23] Typically, rulemaking proceedings are required only when the FCC seeks to adopt, modify or delete rules of general applicability. *See, e.g., Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Third Order on Reconsideration, 12 FCC Rcd 6258, ¶ 13 (1997) (explaining that a "rulemaking process of general applicability is not the appropriate procedure to adjudicate a specific matter involving a particular party"); *see also Broadcast Corp. of Georgia (WVEU-TV) Atlanta, Georgia; For Authority to Resume Full Power Operation*, Memorandum Opinion and Order, 96 F.C.C.2d 901, ¶ 14 (1984) (explaining that rulemaking proceedings generally are "directed to the implementation of general policy concerns into legal standards").

issued Public Notices ("PNs") seeking comment on the petitions.[24] In addition, the Commission's forbearance decisions are styled as "Memorandum Opinions and Orders." As the D.C. Circuit has noted, "[o]pinions are the end products of adjudications."[25] The Commission's forbearance orders also do not include the impact statements that the Regulatory Flexibility Act requires "for rules that must be promulgated under § 553 of the [Administrative Procedure Act ("APA")], but not for interpretive rules (or adjudicative decisions)."[26] As the foregoing makes clear, grant of forbearance relief does not require notice and comment rulemaking proceedings.

Given that grants of forbearance do not require a formal rulemaking proceeding,[27] it follows that reversing or modifying forbearance grants likewise does not require notice and comment rulemaking.[28] In fact, the Petition asks only that the FCC act on its previous statements and fulfill its goal of restoring regulatory parity between Verizon and

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[24] *See, e.g.,* Public Notice, *Comments Invited on Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, 19 FCC Rcd 24935 (2004); Public Notice, *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 21 FCC Rcd 7942 (2006); Public Notice, *Pleading Cycle Established for Comments on Embarq Local Operating Companies' Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, 21 FCC Rcd 8662 (2006).

[25] *Cent. Tex. Tel. Coop. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (distinguishing between rulemakings and adjudications).

[26] *Cent. Tex. v. FCC*, 402 F.3d at 211.

[27] Indeed, as noted above, Verizon's "grant" of forbearance occurred by default, and was not the result of any Commission rulemaking *or* adjudication. *See also Order on E911 Accuracy Standards Forbearance Petition* ¶ 12 (finding that forbearance petitions can be decided using adjudicatory processes).

[28] *Cf. CTIA v. FCC*, 330 F.3d at 504-507, 513 (upholding the Commission's decision to deny a petition seeking permanent forbearance from rules from which the Commission had previously granted temporary forbearance).

similarly-situated carriers. As explained below, this result can be accomplished through either an informal adjudication or an interpretative rule, neither of which require a notice and comment rulemaking proceeding.[29]

The FCC commonly uses informal adjudications to decide a wide variety of matters, ranging from forbearance proceedings to merger applications. Under the APA, an "adjudication" merely refers to an "agency process for the formulation of an order."[30] Adjudications are generally informal, unless there is a statutory requirement calling for a formal adjudication.[31] The FCC has previously found that "a petition for forbearance is resolved under the usual standards for agency adjudication."[32]

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[29] *See* 5 U.S.C. § 553(b)(3)(A); *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (explaining that informal adjudications do not trigger the notice requirements of the APA); *General Motors Corp. v. Ruckelshaus,* 742 F.2d 1561, 1565 n.6 (D.C. Cir. 1984) ("interpretative rules are not subject to the procedural requirements set down by . . . the APA"); *Army-Air Force Exchange, Travel Agent Services*, Order on Reconsideration (Order 80-6-40), 85 C.A.B. 2470, 1980 CAB LEXIS 334, *4 (1980) (explaining that both informal adjudications and interpretative rules "are outside the notice and comment requirements of section 553" of the APA); *Order on E911 Accuracy Standards Forbearance Petition* ¶ 12.

[30] 5 U.S.C. § 551(7). An "order" refers to "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. § 551(6).

[31] "Formal adjudications" are adjudications that are "required by statute to be considered through on-the-record proceedings and involve development of record through a trial-type hearing," while "informal adjudication" is "a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on-the-record' hearings." *Bettuci v. United States,* 14 F. Supp. 2d 45, 51 (D.D.C. 1998); *see also Pension Benefit Guar. Corp. v LTV Corp.,* 496 U.S. 633, 655 (1990) (holding that an agency determination was "lawfully made by informal adjudication" which did not require the agency to follow the "trial-type procedures" that apply to formal adjudications).

[32] *Order on E911 Accuracy Standards Forbearance Petition* ¶ 12; *see also Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, ¶ 19 n.72 (2009) ("*Forbearance Procedural Order*").

Alternatively, the Commission could grant the relief sought in the Petition by issuing an "interpretative rule" based solely on the FCC's reading of the relevant statutes. Interpretative rules do not require formal notice and comment rulemaking proceedings and can be used to create new duties, alter existing conduct, or achieve some other "substantial impact."[33]

For an agency's action to be categorized as an interpretative rule, "the rule must be interpreting something. It must derive a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document."[34] As one court explained, "[i]n the field of federal administrative law and within the meaning of the APA, an interpretative rule is one that in form and substance interprets (1) a statute, (2) a legislative rule, (3) another interpretative rule, (4) judicial decisions, (5) administrative decisions, (6) administrative rulings, (7) any other law or interpretations, [or] (8) any combination of the above . . . ."[35]

Thus, the Commission could grant the Petition by issuing an interpretative ruling based on its reading of the Communications Act.[36] For example, as noted above, the

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[33] *See, e.g.*, *Cent. Tex. v. FCC*, 402 F.3d at 214 (citing precedents finding rules to be interpretative even though they "altered primary conduct" or had "a substantial impact").

[34] *Cent. Tex. v. FCC*, 402 F.3d at 212 (internal quotations and citations omitted).

[35] *Energy Consumers & Producers Ass'n v. Dep't of Energy*, 632 F.2d 129, 140 (Temp. Emer. Ct. App. 1980).

[36] A grant of forbearance does not eliminate the forborne statutes or regulations. Rather, forbearance grants reflect the FCC's view that the statutes or regulations in question are not "necessary" within the meaning of section 10. Just as it does not require a rulemaking proceeding for the FCC to interpret section 10 to permit it to forbear from enforcing certain generally-applicable rules and statutory provisions, it also does not require a rulemaking proceeding for the FCC to revisit that grant of relief and "re-interpret" section 10 to require the agency to re-impose the forborne rules and provisions.

Commission could find that relieving Verizon of its statutory obligations to act in a just and reasonable manner is inconsistent with section 10(a)'s requirement that forbearance be granted only if enforcement of the relevant provision is not necessary to ensure that a carrier's actions are just and reasonable and not unreasonable discriminatory. Such a finding would be in accordance with prior Commission orders addressing petitions brought by other incumbent LECs seeking relief similar to that "granted" to Verizon. If the Commission's "entire justification for the rul[ing] is comprised of reasoned statutory interpretation, with reference to the language [and] purpose" of the relevant statutes, then the resulting Commission action is correctly categorized as an "interpretative rule."[37]

Accordingly, the Commission's order addressing the Petition would be properly characterized as either an informal adjudication of the issues presented or as an interpretative ruling reflecting the Commission's view of the Communications Act. Indeed, this characterization is supported by the FCC's statements in its 2009 order establishing new procedures governing petitions for forbearance, in which the Commission explicitly declined to find that forbearance proceedings constitute rulemakings.[38] Thus, it is clear that the Commission does not need to open a formal

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[37] *General Motors v. Ruckelshaus,* 742 F.2d at 1565.

[38] *Forbearance Procedural Order* ¶ 19 n.72 (explaining that the adoption of new filing requirements for petitions for forbearance "in no way implies that we consider forbearance petitions to be, or fundamentally to resemble, rulemakings."). In addition, there is no reason to subject the Petition to the rules governing new petitions for forbearance. *See, e.g.,* Comments of Hawaiian Telecom, Inc., WC Docket No. 11-188, at 9-10 (Dec. 20, 2011). Those procedural rules were adopted to prevent problems that had arisen as parties sought forbearance relief that was increasingly broad and complex and as petitions became less specific regarding the relief requested. *Forbearance Procedural Order* ¶ 6. By their terms, these procedural rules apply only to petitions seeking forbearance; not to petitions seeking to reverse grants for forbearance. It is also worth noting that Verizon's petition seeking forbearance relief was not subject to the new procedural rules. In fact, the procedural rules were adopted, at least in part, in reaction to

rulemaking proceeding in order to act on the Petition.[39]

C. There Is No Need for the Commission to Compile a New Record

Contrary to Verizon's claims, the Commission does not need to develop an extensive record before granting the Petition. In fact, as far back as 2007, the FCC indicated that it had sufficient information, as well as the necessary authority, to modify Verizon's grant of forbearance without conducting any additional proceedings.[40]

Verizon received forbearance by operation of law, not as a result of any factual findings by the FCC, a court, or any other adjudicatory body. Thus, the original grant was not based on any record evidence, or on any FCC order. [41] Indeed, as Megapath

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Verizon's petition being granted by operation of law. *See Forbearance Procedural Order* ¶¶ 7-8. Thus, there is no reason that a petition to reverse Verizon's grant of forbearance should be subject to procedural rules that apply only to new petitions for forbearance.

[39] Sprint Nextel's view that the FCC can grant the Petition without initiating a rulemaking proceeding is further buttressed by the Commission's prior statements indicating that it was planning to modify/reverse Verizon's default grant of forbearance without any further proceedings. *See, e.g., AT&T Forbearance Order* ¶ 50 (indicating that FCC would issue an order addressing Verizon's forbearance petition within 30 days of issuing the *AT&T Forbearance Order* without conducting any additional proceedings).

[40] *See, e.g.*, *AT&T Forbearance Order* ¶ 50.

[41] This fact makes Verizon's attempt to rely on Mr. Schlick's opinion that overturning a grant of forbearance is "difficult" inapposite. *Cf.* Verizon Comments at 5. That statement was made in the context of discussing a forbearance order that would have been based on a substantial evidentiary record and a detailed FCC analysis justifying the grant of forbearance. Those circumstances are plainly distinguishable from the Verizon situation in which forbearance was "deemed granted." This failure to distinguish between forbearance decisions issued by the FCC and forbearance relief that was granted by operation of law is a basic flaw that infects Verizon's entire pleading. For example, Verizon argues that the FCC cannot ignore data that tests the propositions on which the agency based its decision. Verizon Comments at 7, quoting *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006). But, as Verizon admits, there was no "agency decision" granting Verizon forbearance. Instead, Verizon's default forbearance was granted "by operation of law." Verizon Comments at 6, quoting *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

notes, Verizon failed to adequately justify its original forbearance petition.[42] Verizon received forbearance simply due to the fortuitous fact that the FCC was unable to reach a majority decision on the merits in a timely manner, resulting in Verizon's petition being "granted" by operation of law.

Because Verizon was "granted" relief solely due to Commission inaction,[43] reversing that default grant of relief should not require the FCC to find that circumstances have changed since Verizon originally received its default grant of forbearance.[44] The FCC can simply rely on the policy judgment it has articulated in addressing other carriers' requests for similar relief – that persistent regulatory disparities between similarly-situated competitors are harmful – along with its previous findings that the Title II provisions at issue here provide critical safeguards for competition and for consumers.[45]

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[42] Comments of MegaPath Inc. and U.S. TelePacific Corp., WC Docket No. 11-188, at 9-10 (Dec. 20, 2011) ("MegaPath Comments").

[43] As the D.C. Circuit explained, the Commission's "deadlocked vote cannot be considered an order of the Commission nor can it constitute agency action." *Sprint v. FCC,* 508 F.3d at 1131-32. Thus, the "Commission did not grant Verizon's petition and it did not deny it." *Id.* (holding that the grant of Verizon's forbearance petition did not result in reviewable agency action).

[44] *See Sprint v. FCC*, 508 F.3d at 1132-33 (noting that in the case of Verizon's default grant of forbearance, there was no agency reasoning for the court to review); *see also* MegaPath Comments at 7 (explaining that reversing Verizon's default grant of forbearance "would not require the same 'detailed justification' [necessary] to overturn a prior agency decision," but noting that the FCC has sufficient justification to reapply Title II requirements to Verizon, nonetheless); Petition at 21-23.

[45] *See* Petition at 21-23; *AT&T Forbearance Order* ¶ 50; *see also, e.g.*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) ("the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change"). In this case, the FCC would not be changing course, as it never acted to grant Verizon unique status as the only carrier that is exempt from the non-dominant carrier provisions and regulations at issue. *See Sprint v. FCC,* 508 F.3d at 1132 (noting that "the Commission took no action" in regard to Verizon's petition for forbearance). Indeed, a reversal of the

The FCC does not need a detailed record to conclude that exempting Verizon from requirements that apply to all other LECs "is not in the public interest within the meaning of section 10(a)(3)."[46] It can simply rely on its prior analyses to support a finding that forbearing from applying basic Title II obligations on Verizon "confer[s] a regulatory advantage on [Verizon] vis-à-vis its" competitors.[47] In addition, the FCC has already found that forbearance from the regulations in question also fails to protect consumers within the meaning of section 10(a)(2) of the Act.[48]

Even Verizon makes little effort to convince the Commission that it deserves to be subject to less regulation than other carriers, especially non-dominant carriers.[49]

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grant of forbearance from non-dominant carrier regulation of Verizon would be entirely consistent with the Commission's previous decisions denying other incumbent LECs' petitions seeking similar relief, as well as the Commission's statements in those decisions regarding the importance of avoiding regulatory disparities.

[46] *AT&T Forbearance Order* ¶ 61; *see also id.* ¶ 67 (refusing to create a "disparity in regulatory treatment between AT&T and its competitors" and finding that granting such "preferential treatment" would be inconsistent with Congress's goals); *Embarq/Frontier Forbearance Order* ¶ 59 (noting that the relief requested goes "beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier" and would create "a disparity in regulatory treatment between the petitioners and their competitors [that] . . . would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power").

[47] *AT&T Forbearance Order* ¶ 58; *see also Embarq/Frontier Forbearance Order* ¶ 53.

[48] *See, e.g., AT&T Forbearance Order* ¶¶ 74-75 (concluding that forbearing from the public policy requirements of Title II – including sections 222, 225, 251(a), 254 and 255 – would be "inconsistent with the critical national goals that led to the adoption of these requirements") .

[49] Verizon's reliance on *Brand X* is inapposite. *See* Verizon Comments at 9-10. In that case, the court concluded that the FCC had provided a reasoned explanation for the disparate treatment of cable modem and DSL services. *NCTA v. Brand X*, 545 U.S. 967, 1000-1001. In addition, the court correctly noted that the FCC's decision to classify cable modem service as an information service appeared to be a first step in an effort to reshape the way it regulated Internet access services. *NCTA v. Brand X*, 545 U.S. at 1002. By contrast, the FCC has never provided a reasoned explanation for the disparate treatment of Verizon. To the contrary, the only time the Commission has addressed the

Rather, Verizon argues that "the right way to achieve parity would be to *extend* the forbearance granted to Verizon to other providers."[50] This argument is facile, at best, and has already been rejected by the Commission.[51]

The obvious path to regulatory parity is to reapply the statutes and regulations from which Verizon was granted relief by operation of law – without any formal analysis by the FCC. Under no circumstances should the FCC attempt to achieve regulatory parity by relieving all other incumbent LECs of their obligations to comply with the non-dominant carrier obligations in question. As the FCC has repeatedly found, the provisions and regulations at issue provide meaningful protections to customers of non-TDM services and are squarely in the public interest.[52] Indeed, Verizon's argument that other carriers should be exempted from basic Title II statutory and regulatory provisions flies in the face of prior Commission decisions.[53] When the FCC analyzed the claims of other incumbent LECs, such as AT&T, Embarq and Frontier, it concluded that none of

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disparity between Verizon and other carriers, it has indicated an intention to revisit Verizon's unique status and restore parity. *See, e.g., AT&T Forbearance Order* ¶ 50. It is also clear that Verizon's default forbearance was not a first step in an effort to forbear from applying Title II regulations to other LECs. Instead, the FCC's decisions leave no doubt about the continued importance of basic Title II regulations. *See, e.g., Qwest Forbearance Order* ¶¶ 2, 42, 64-65.

[50] Verizon Comments at 3.

[51] *See AT&T Forbearance Order* ¶ 50 (rejecting AT&T's request for forbearance from non-dominant carrier regulation and indicating that the Commission would eliminate regulatory disparities between Verizon and other LECs by reversing Verizon's grant of forbearance from non-dominant carrier regulation).

[52] *See, e.g., Qwest Forbearance Order* ¶ 65 (explaining that "nondominant carrier regulations provides significant consumer benefits without the costs of dominant carrier regulation" and noting that "many of the obligations that Title II imposes on carriers or LECs generally . . . foster the open and interconnected nature of our communications system, and thus promote competitive market conditions within the meaning of section 10(b)").

[53] *See, e.g.*, *AT&T Forbearance Order* ¶¶ 50, 67, 75.

them were entitled to relief from non-dominant carrier regulation.[54] In refusing to grant the requested forbearance relief, the Commission noted that, *inter alia,* "the protections provided by sections 201 and 202(a), coupled with our ability to enforce those provisions in a complaint proceeding pursuant to section 208, provide essential safeguards that ensure" carriers will not impose "unjust, unreasonable or unreasonably discriminatory rates, terms, and conditions in connection with" non-TDM broadband services.[55] Further, because the Commission concluded that "disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers,"[56] it indicated that it should revisit Verizon's default grant of forbearance.[57] That same reasoning holds true today.

D. The Competitiveness of the Enterprise Broadband Services Market Is Irrelevant

There is no reason for the FCC to undertake the sort of detailed examination of the marketplace that Verizon appears to envision. As noted above, the Petition seeks reinstatement only of "general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements" that are applicable to other

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[54] *See, e.g.*, *AT&T Forbearance Order* ¶ 67 (concluding that forbearance from statutory and regulatory requirements that apply generally to non-dominant carriers and LECs – including sections 201 and 202(a) – would not meet the statutory forbearance criteria). Tellingly, the U.S. Court of Appeals for the D.C. Circuit found "no legal basis to upset the FCC's policy judgment" that leaving in place "basic Title II common-carrier regulation" would promote competition and the public interest. *Ad Hoc Telecomms. Users Comm. v. FCC,* 572 F.3d 903, 908-909 (D.C. Cir. 2009); *see also id.* at 911 (finding that the FCC acted reasonably when it sought to promote broadband competition and deployment by maintaining common carrier regulation of the incumbent LECs' special access lines, including the requirement that prices be just, reasonable and not unreasonably discriminatory).

[55] *AT&T Forbearance Order* ¶ 67.

[56] *Id*. ¶ 68.

[57] *Id*. ¶ 50.

LECs.[58] By definition, the Title II provisions covered by the Petition apply to carriers even if they are not dominant.[59] Indeed, the statutory provisions in question represent the most basic forms of customer protection.[60]

To the extent that Verizon is arguing that its provision of non-TDM-based broadband transmission services should not be subject basic Title II requirements because the marketplace for such services is competitive, that argument has already been rejected by the FCC. In addressing the forbearance petitions filed by AT&T and other incumbent LECs, the FCC agreed to relieve those carriers from dominant carrier regulation in light of the competition it believed the incumbent LECs faced in the marketplace for non-TDM broadband services, but refused to relieve those carriers from non-dominant carrier regulation. As the FCC explained "[t]his regulation . . . provide[s] important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers."[61] In subjecting carriers to these requirements, Congress and the FCC "necessarily determined that these requirements were needed to protect the public interest

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[58] Petition at 1, 10-13.

[59] *See, e.g.*, *Embarq/Frontier Forbearance Order* ¶ 60 (noting that in subjecting non-dominant carriers to certain requirements, "the Commission necessarily determined that these requirements were needed to protect the public interest and competitive markets in situations where a carrier lacks market power"); *AT&T Forbearance Order* ¶ 65 ("Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally regardless of whether they are incumbents or competing carriers."); *see also* MegaPath Comments at 3 (noting that "all LEC providers of non-TDM-based broadband transmission services, except Verizon, continue to remain subject to Title II regulation").

[60] *See, e.g.*, 47 U.S.C. §§ 201-202 (requiring that rates and practices be just and reasonable and not unjustly or unreasonably discriminatory); 47 U.S.C. § 222 (protecting proprietary consumer information); *see also AT&T Forbearance Order* ¶ 67 (discussing the "market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power").

[61] *AT&T Forbearance Order* ¶ 65.

and competitive markets [even] in situations where a carrier lacks market power."[62] Accordingly, whether Sprint Nextel or others are "thriving" is irrelevant.

The regulations at issue here serve only to protect consumers and reapplying these regulations to Verizon would help ensure a level playing field for all carriers. As the FCC found in its earlier forbearance decisions, there is no reason that consumer protections, such as those provided by sections 201, 202 and 222 of the Act, for example, should not apply to incumbent LECs. The Commission has found that these provisions – along with "economic regulations" of sections 214 and 251(b) of the Act, and the FCC's regulations under sections 63.71(c), 63.03(b) and Part 61, subpart C of its rules – provide important protections that make forbearance from these provisions and regulations inappropriate.[63] Similarly, forbearance from the "public policy regulations" of sections 254(d), 225, 255, 251(a)(2), 222 and 229 is "inconsistent with the critical national goals that led to the adoption of these requirements."[64]

Finally, it is unclear why Verizon's existing contracts with end users would be affected adversely by the reapplication of the regulations and statutes that apply generally to all other LECs.[65] Verizon fails to provide any explanation of how its customers would be harmed if the Commission reinstated non-dominant carrier regulation of Verizon. Indeed, it is difficult to fathom how the restoration of consumer protection regulation could be detrimental to Verizon's customers.

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[62] *Id*. ¶ 68.

[63] *See* Petition at 10-11, and orders cited therein.

[64] Petition at 12, quoting *AT&T Forbearance Order* ¶ 75; *Embarq/Frontier Forbearance Order* ¶ 67; *Qwest Forbearance Order* ¶ 72.

[65] *See* Verizon Comments at 4-5.

III. CONCLUSION

For all the reasons stated above, as well as the reasons detailed in the Petition, the Commission should grant the Petition and restore regulatory parity between Verizon and similarly-situated providers of non-TDM-based broadband transmission services.

Respectfully submitted,

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January 19, 2012

Certificate of Service

I hereby certify that on this 19th day of January, 2012, I caused true and correct copies of the foregoing Reply Comments of Sprint Nextel Corporation to be mailed by electronic mail to:

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